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No. 92-1536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CIRCLE NATIVE COMMUNITY,

Petitioner,

v.

STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

Brief of Amici Curiae Native Village of Kluti Kaah, Native Village of Tyonek, Native Village of Tatitlek, Native Village of Chenega Bay and Native Village of Port Graham In Support of Petition For Writ of Certiorari to the Supreme Court of the State of Alaska

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
I. THE RULING BELOW IS INCONSISTENT WITH EVERY OTHER COURT'S INTERPRETATION OF THE INDIAN CHILD WELFARE ACT AND PUBLIC LAW 280	2
II. THE ALASKA SUPREME COURT'S RULING IS IN DIRECT CONFLICT WITH FEDERAL COURT DECISIONS ON TRIBAL STATUS	7
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
Alaska, ex rel. Yukon Flats School District v. Native Village of Venetie, 856 F.2d 1384 (9th Cir. 1988)	12
Brendale v. Yakima Indian Nation, 492 U.S. 408 (1989)	4
Bryan v. Itasca County, 426 U.S. 373 (1976)	6
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)	6
Chilkat Indian Village v. Johnson, No. 90-01 (Chilkat Indian Village Tribal Court)	12
Chilkat Indian Village v. Johnson, No. J84-024, *slip op.*, (D. Alaska Oct. 9, 1990)	12
Fisher v. District Court, 424 U.S. 382 (1976)	5
In re K.E., 744 P.2d 1173 (Alaska 1987)	7
In re McCord, 151 F. Supp. 132 (D. Alaska 1957)	10
In re Sah Quah, 31 F. 327 (D. Alaska 1886)	10
John v. State, 347 So. 2d 959 (Mississippi 1977)	11
Kie v. United States, 27 F. 351 (C.C. Or. 1886)	10
Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)	3,4
Native Village of Nenana v. Department of Health & Social Services, 722 P.2d 219 (Alaska), *cert. denied*, 479 U.S. 1008 (1986)	2,3,5,7,17
Native Village of Stevens v. Alaska Management & Planning, 757 P.2d 32 (Alaska 1988)	10-13
Native Village of Venetie I.R.A. Council v. Alaska, 944 F.2d 548 (9th Cir. 1991)	2,5-12
People of South Naknek v. Bristol Bay Borough, 466 F. Supp. 870 (D. Alaska 1979)	10
Solem v. Bartlett, 465 U.S. 463 (1984)	13

Table of Authorities Continued

	Page
Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)	8-10
Three Affiliated Tribes of Ft. Berthold v. Wold, 476 U.S. 877 (1986)	6
Tlingit and Haida Indians v. United States, 389 F.2d 778 (1968)	10
United States v. John, 437 U.S. 634 (1978)	11
United States v. Kagama, 118 U.S. 375 (1886)	8
United States v. Seveloff, 27 F. Cas. 1021 (D. Or. 1872)	10
United States v. Washington State Comm. Fishing Passenger Vessel Association, 443 U.S. 658 (1979)	13
Walker v. Rushing, 898 F.2d 672 (8th Cir. 1990)	6
Waters v. Campbell, 29 F. Cas. 411 (C.C.D. Or. 1876)	10
STATUTES	
25 U.S.C. § 1901	2,4
25 U.S.C. § 1901(5)	4
25 U.S.C. § 1903(8)	4
25 U.S.C. § 1911(a)	4
25 U.S.C. § 1911(b)	5
25 U.S.C. § 1918	5
25 U.S.C. § 1918(a)	3
28 U.S.C. § 1360(c)	4
43 U.S.C. § 1602(c)	4
MISCELLANEOUS	
Neidermeyer, *"The True Interest of a White Population": The Alaska Indian Country Decisions of Judge Matthew P. Deady*, 21 N.Y.U. J. of Intl. L & Politics 195 (1988)	10
Sol. Op. No. M-3675 (Jan. 11, 1993)	11

INTEREST OF *AMICI CURIAE*[1]

The Native Villages of Kluti Kaah, Tyonek, Chenega Bay, Port Graham and Tatitlek are representative of the roughly 200 Native tribes in Alaska that have governed local matters according to custom and tradition from time immemorial. Tyonek, Chenega Bay, and Tatitlek reorganized their governments pursuant to the provisions of the Indian Reorganization Act, while the other villages maintain traditional council forms of government. Each *amici* village is directly and adversely affected by the Alaska Supreme Court's ruling in this case, and by the refusal of that court to accept the contrary holdings of the Court of Appeals for the Ninth Circuit.

Nearly all of the 200 Native villages in Alaska have tribal governments which exercise authority over child custody matters affecting members. They also, to varying degrees, exercise authority over non-member residents whose actions directly affect the health, welfare and economies of their communities. The institutions utilized by the tribes for governance include courts, elders councils and various other institutions similar to those employed by Indian tribes in the remainder of the United States. The federal courts acknowledge the authority, or potential authority, of the villages in such matters, but Alaska's courts have rejected these decisions. The result is a scenario in which tribal authority is recognized when a case is litigated in federal court, but not when it is litigated in state court. The Alaska Supreme Court's ruling denies Alaska's Native tribes any semblance of the

[1] The written consent of the parties to the filing of this brief is filed herewith.

inherent rights and powers of tribal self-governance recognized by numerous decisions of this Court and Acts of Congress. It also frustrates the implementation of the Indian Child Welfare Act as it pertains to tribal control over Indian children.

The petition for a writ of certiorari should be granted because the decision below: 1) is in direct and explicit conflict with a ruling of the Ninth Circuit Court of Appeals as well as other federal courts respecting the effect of Public Law 280 and the Indian Child Welfare Act on concurrent tribal jurisdiction; 2) negates the central purposes of the Indian Child Welfare Act to limit state court action and increase the role of tribal court jurisdiction; and 3) is in direct conflict with federal court decisions respecting the tribal status of Alaska Native villages.

I. THE RULING BELOW IS INCONSISTENT WITH EVERY OTHER COURT'S INTERPRETATION OF THE INDIAN CHILD WELFARE ACT AND PUBLIC LAW 280

The ruling below holds that the Circle Native Community "has no jurisdiction to decide child custody matters." App. A4. In so ruling, the court relied on the very act of Congress passed to limit state jurisdiction and expand tribal authority over Indian children—the Indian Child Welfare Act, 25 U.S.C. §§ 1901 *et seq.* While acknowledging that the Ninth Circuit Court of Appeals had reached the opposite conclusion in *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991) (hereinafter *Native Village of Venetie*), the Alaska Supreme Court, without analysis, rejected the Ninth Circuit's holding. It relied entirely on its earlier decision in *Native Village of Nenana v. Department of Health & Social Services*,

722 P.2d 219 (Alaska), *cert. denied*, 479 U.S. 1008 (1986) (*Nenana*), which held that:

> Our reading of 25 U.S.C. § 1918(a) indicates that Congress intended that Public Law 280 [67 Stat. 588] give certain states, including Alaska, exclusive jurisdiction over matters involving the custody of Indian children, and that those states exercise such jurisdiction until a particular tribe petitions to reassume jurisdiction over such matters, and the Secretary of the Interior approves [a] tribe's petition.

722 P.2d at 221. This conclusion is flatly contradicted by the Ninth Circuit Court of Appeals, by the purposes underlying the Indian Child Welfare Act, and is inconsistent with settled law governing termination of tribal powers.

The Indian Child Welfare Act (ICWA) was passed to halt abusive state child welfare practices that had resulted in "the wholesale removal of Indian children from their homes, . . . the most tragic aspect of Indian life today." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989), *quoting* Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess., 3 (statement of William Byler). Congress found:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by non-tribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions;

25 U.S.C. § 1901. Congress also explicitly found that the States "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5). "[T]he ICWA thus, in the words of the House Report accompanying it, seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." *Holyfield*, 490 U.S. at 37. The Act explicitly defines "Indian tribe" to include "any Alaska Native village as defined in section 1602(c) of Title 43." 25 U.S.C. § 1903(8).

The Alaska Supreme Court's decision deprives over 200 Alaska Native villages of the ability to adjudicate child custody matters pursuant to the ICWA's tribal forum preference. 25 U.S.C. § 1911(a) and (b). The decision not only conflicts with the language and purpose of ICWA, it is also contrary to the entire thrust of this Court's opinions recognizing the inherent tribal authority of Indian tribes over their children. While in many areas the precise scope of tribal jurisdiction is dependent on the facts of particular cases, this Court has repeatedly recognized and favored tribal authority over internal matters involving children. *Compare Brendale v. Yakima Indian Nation*, 492 U.S. 408 (1989), *with Mississippi Band of Choctaw Indians*

v. Holyfield, 490 U.S. 30, 42 (1989) (*citing cases*), and *Fisher v. District Court*, 424 U.S. 382 (1976). Nevertheless, the Alaska Court would require Alaska tribes to petition the Secretary of the Interior pursuant to 25 U.S.C. § 1918 in order to "reassume" the power to exercise concurrent authority over Indian child custody matters.

As the Petitioner correctly points out, the decision of the Alaska Court is in direct and express conflict with the Ninth Circuit Court of Appeal's decision in *Native Village of Venetie, supra.* In that case the Court of Appeals held that Alaska tribes retain concurrent jurisdiction over domestic relations matters, and thus do not have to petition to "reassume" their concurrent jurisdiction pursuant to § 1918 of ICWA.[2]

The Court of Appeals is correct. Public Law 280 did not, as the Alaska Court has held, "give certain states, including Alaska, exclusive jurisdiction over matters involving the custody of Indian children . . . ."

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[2] The Ninth Circuit determined that a tribe in a P.L. 280 state might, pursuant to § 1918, petition the Secretary to reassume *exclusive* or *mandatory transfer* jurisdiction:

> Each of these types of jurisdiction is broader than any tribal jurisdiction which is concurrent with the states. Exclusive jurisdiction, of course, is clearly broader than concurrent jurisdiction. Likewise, referral jurisdiction is broader in scope than concurrent jurisdiction, in that referral jurisdiction is concurrent *but presumptively tribal* jurisdiction. *See id.* § 1911(b). Thus, there is something for a tribe to "reassume" under section 1918—namely, exclusive or referral jurisdiction—even if Public Law 280 is read as not divesting the tribes of concurrent jurisdiction.

944 F.2d at 561.

Nenana, supra, 722 P.2d at 221. Rather, as the Ninth Circuit has held:

> Public Law 280 was designed not to supplant tribal institutions, but to supplement them.
>
> The Supreme Court has also adopted the view that Public Law 280 is not a divestiture statute. *See Cabazon Band of Mission Indians,* 480 U.S. at 207-12, 107 S.Ct. at 1087-90; *Bryan,* 426 U.S. at 383-90, 96 S.Ct. at 2108-12; *see also Walker v. Rushing,* 898 F.2d 672, 675 (8th Cir. 1990) ("Public Law 280 did not itself divest Indian tribes of their sovereign power to punish their own members for violations of tribal law. Nothing in the wording of Public Law 280 or its legislative history precludes concurrent jurisdiction.").

Native Village of Venetie, supra, 944 F.2d at 560. The Ninth Circuit's interpretation of Public Law 280 is consistent with subsection (c) of the Act which contemplates the ongoing vitality of tribal governmental authority by requiring affected states to give full force and effect to "any tribal ordinance or custom heretofore *or hereafter adopted* by an Indian tribe, band, or community in the exercise of any authority which it may possess . . . ." 28 U.S.C. § 1360(c) (emphasis added). Alaska's insistence on interpreting Public Law 280 as extinguishing tribal authority is in irreconcilable conflict with this Court's decisions in *Bryan v. Itasca County,* 426 U.S. 373 (1976), *Three Affiliated Tribes of Ft. Berthold v. Wold,* 476 U.S. 877 (1986), and *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987). As this Court concluded in *Bryan:*

> [N]othing in [Public Law 280's] legislative history remotely suggests that Congress meant the Act's

> extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private voluntary organizations.'

426 U.S. at 388 (citations omitted).

The Alaska Supreme Court neither mentioned nor discussed this Court's Public Law 280 precedents in its ruling that Public Law 280 extinguished tribal jurisdiction. *See Nenana, supra,* 722 P.2d 219 (Alaska 1986); *reaffirmed* in *In Re K.E.*, 744 P.2d 1173 (Alaska 1987). Given the chance to revisit its interpretation in light of the Ninth Circuit's careful analysis, the Alaska Supreme Court simply stated that "[t]he decision in *Native Village of Venetie* fails to persuade us that our prior cases should be overruled," and in a footnote added:

> Where a federal question is involved, the courts of Alaska are not bound by the decisions of a federal court other than the United States Supreme court.

In Re F.P., App. A2. Thus, it is clear that the only means by which this conflict over the interpretation of Public Law 280 and the Indian Child Welfare Act will be resolved is through the exercise of this Court's discretion to review the decision below.

II. THE ALASKA SUPREME COURT'S RULING IS IN DIRECT CONFLICT WITH FEDERAL COURT DECISIONS ON TRIBAL STATUS

Local hostility to tribal status in Alaska has triggered substantial litigation in the state and federal courts. The results of this litigation reflect the State/federal conflict over tribal status, with state courts

denying tribal existence and federal courts affirming it. This is not surprising. As this Court noted in *United States v. Kagama*, 118 U.S. 375, 385 (1886), "the people of the states where they [Natives] are found are often their deadliest enemies."

In *Native Village of Venetie, supra*, the Ninth Circuit affirmed that the historical sovereign status of Alaska Native villages is no different than that of tribes elsewhere:

> Indian sovereignty flows from the historical roots of the Indian tribe. *See Wheeler*, 435 U.S. at 322-23. Tribal sovereignty exists unless and until affirmatively divested by Congress. *See id.* at 323. Thus, to the extent that Alaska's natives [*sic*] formed bodies politic to govern domestic relations, to punish wrongdoers, and otherwise to provide for the general welfare, we perceive no reason why they, too, should not be recognized as having been sovereign entities. If the native [*sic*] villages of Venetie and Fort Yukon are the modern-day successors to sovereign historical bands of natives [*sic*], *the villages are to be afforded the same rights and responsibilities as are sovereign bands of native* [*sic*] *Americans in the continental* [*sic*] *United States.*

944 F.2d at 558-59. The conclusion that Alaska Native villages have the same tribal status and powers as tribes in the lower 48 states simply reiterates the holding of this Court 38 years ago in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). In *Tee-Hit-Ton* this Court unhesitatingly affirmed a Court of Claims decision that Alaska Natives possessed aboriginal tribal rights to the lands they occupied. In so

doing, the Court agreed that Tee-Hit-Ton Indians were a "clan of the Tlingit tribe," an "identifiable group of American Indians . . . residing in Alaska" and a "tribe" with "tribal" attributes. *Id.* at 273, 275, 279, 282, 285, and 286. The Court found "that land claims among the Tlingits, and likewise of their smaller group, the Tee-Hit-Tons, was [*sic*] wholly tribal. It was more a claim of sovereignty than of ownership." *Id.* at 287. On this basis the Court concluded "that the [Tee-Hit-Ton's] use of its lands was like the use of the nomadic tribes of the [Lower 48] States Indians." *Id.* at 288.

The significance of the Court's holding in *Tee-Hit-Ton* is its conclusion that Alaska tribal claims are indistinguishable from tribal claims of Native American groups elsewhere, and must be evaluated within the general framework of federal Indian law applicable to all aboriginal tribes in the United States. The Court explained:

> It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. * * * After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term.

Tee-Hit-Ton Indians, 348 U.S. at 279. The Ninth Circuit has followed this precedent.

In *In Re F.P.* (the decision below), the Alaska Supreme Court responded to the Ninth Circuit's *Venetie* decision with the brief statement that "[t]his

opinion is contrary to *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988), where we concluded that the history of the relationship between the federal government and Alaska Natives . . . indicates Congress intended that most Alaska Native groups not be treated as sovereigns. *Id.* at 34." App. A2. The *Stevens Village* opinion rests on the court's parochial assumptions that Alaska Natives *per se* are "different"; that the government's treatment of them has differed from its dealings with tribes elsewhere; and that, therefore, Alaska Native villages are not tribes and have no power over internal matters. 757 P.2d at 35-40. The court based these assumptions on some court decisions from early territorial days which denied that Alaska villages possessed tribal sovereignty, aboriginal rights, or occupied Indian country, without reference to principles of federal Indian law applicable elsewhere in the United States. *See, United States v. Seveloff*, 27 F. Cas. 1021 (D. Or. 1872); *Waters v. Campbell*, 29 F. Cas. 411 (C.C.D. Or. 1876); *Kie v. United States*, 27 F. 351 (C.C. Or. 1886); and *In re Sah Quah*, 31 F. 327 (D. Alaska 1886). These decisions were wrong when decided, and have been explicitly repudiated by the Ninth Circuit.[3] *Native Village of*

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[3] Earlier cases implicitly overruled them, *see, e.g., Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955); *Tlingit and Haida Indians v. United States*, 389 F.2D 778, 782 (1968); *People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 877 n.12 (D. Alaska, 1979), and *In re McCord*, 151 F. Supp. 132 (D. Alaska 1957) (affirming the existence of Indian country). For a detailed critical analysis of the early decisions cited in text, *see* Neidermeyer, *"The True Interest of a White Population": The Alaska Indian Country Decisions of Judge Matthew P. Deady*, 21 N.Y.U. J. of Intl. L & Politics 195 (1988). Even the Solicitor

Venetie, supra, 944 F.2d at 558.

The conflict here is remarkably similar to that in *United States v. John,* 437 U.S. 634 (1978), in which this Court reviewed a decision of the Mississippi Supreme Court (*John v. State,* 347 So.2d 959 (Mississippi 1977)) holding that the Choctaw Indians of Mississippi did not constitute an Indian tribe subject to federal jurisdiction because they had been "assimilated into the social and political life of the State and that the federal government long ago abandoned its supervisory authority over the Indians." 437 U.S. at 652. Similarly, the Alaska Supreme Court based its negative conclusion regarding tribal status of Alaska Native villages on a lapse in federal jurisdiction and purported assimilation into non-Native society. *Native Village of Stevens,* 757 P.2d at 35-36. The erroneous reasoning of the court below is comparable to that rejected in *John* and can only be corrected by this Court.

The State admits that there are some 200 Native "entities" in Alaska that may call themselves tribes and even act like tribes. According to the State, however, they are nothing more than social clubs with membership based on race and utterly lacking in governmental powers. The State's intractable opposition to Native tribal status is not merely a theoretical difference of opinion. It directly affects daily life in the villages. The State, for example, refuses to recognize the validity of existing tribal court adoptions.

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for the Department of the Interior, in a point-by-point analysis, recently rejected the Alaska Supreme Court's reasoning with respect to tribal status. "Governmental Jurisdiction of Alaska Native Villages Over Land and Nonmembers" at 48-58. Op. No. M-3675 (Jan. 11, 1993).

Native Village of Venetie, supra. As a result, Native adoptive parents have been denied Aid to Families with Dependent Children (AFDC) and other benefits unless they secure legal representation, travel great distances, and utilize state courts to accomplish what has for generations been handled by local tribal custom and authority. Further, the State refuses to recognize tribal sovereign immunity from suit, thereby subjecting tribes to the threat of bankruptcy, foreclosure, loss of lands, and ultimately their very existence. *Native Village of Stevens, supra.* The State likewise refuses to recognize tribal taxing power, which is indispensable to the provision of critical social services and the effective operation of tribal governments. *Alaska, ex rel. Yukon Flats School District v. Native Village of Venetie,* 856 F.2d 1384 (9th Cir. 1988).

The conflict between the Alaska courts and the federal courts is best illustrated by the recent developments in *Chilkat Indian Village v. Johnson,* No. J84-024, *slip op.* (D. Alaska Oct. 9, 1990), where the Federal District Court for Alaska held that Chilkat Indian Village is a federally recognized tribe *and* Indian country. Accordingly, the case was remanded to tribal court for a ruling on the merits of a dispute over ownership of tribal artifacts which an art dealer seeks to acquire. *Chilkat Indian Village v. Johnson,* No. 90-01 (Chilkat Indian Village Tribal Court). The tribal court recently conducted a four-week trial, at which it heard extensive testimony from tribal elders respecting the meaning of tribal law and the ownership of artifacts according to Tlingit law. Thus, federal courts recognize the tribal status and powers of Native tribes and remand cases to tribal courts, while

the state courts operate as if tribal courts do not exist. This situation is similar to other circumstances in which this Court has exercised its discretionary authority to resolve conflicts between state and federal courts on federal Indian law questions. *See, e.g., Solem v. Bartlett*, 465 U.S. 463 (1984); *United States v. Washington State Comm. Fishing Passenger Vessel Ass'n.*, 443 U.S. 658 (1979).

CONCLUSION

The State's intractable opposition to Indian tribes and their inherent powers was unequivocally reaffirmed, albeit with little discussion or analysis, in the decision below. The legal reasoning underlying the Alaska Supreme Court's conclusion that tribes in Alaska have no sovereign powers is articulated in that court's earlier decision in *Stevens Village*; the reasoning underpinning the conclusion below that Public Law 280 divested Alaska tribes of their inherent sovereign powers is voiced in the earlier decision in *Nenana*. Given the opportunity to reevaluate these decisions in light of the Ninth Circuit's recent and careful analysis of the same issues, the Alaska Court simply dug in its heels. The conflict between the decisions of the Alaska Supreme Court and the Ninth Circuit Court of Appeals on these issues has produced an impasse over whether Alaska Native villages, specifically identified as Indian tribes in the Indian Child Welfare Act, must petition the Secretary of the Interior to "reassume" their concurrent jurisdiction over Indian child custody determinations. This impasse can only be resolved by this Court. *Amici* urge that the petition for a writ of certiorari be granted.

Respectfully submitted,

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